

BARNSTABLE Superior Court
NO. BACC 95-046579

Commonwealth,

v.

Amey G. SWELL JR.,
Defendant.

SUPERIOR COURT BARNSTABLE, SS	
Filed	APR 04 2016
<i>Scott W. Kidwell</i> Clerk	

DEFENDANT'S VERIFIED MOTION TO STRIKE ✓
UNTIMELY OPPOSITION TO M.G.L.C. 278A, ss 2-
12 Post-Conviction Forensic AND SCIENTIFIC
ANALYSIS, WHICH WILL UNASSAILABLY
BUTTRESS ACTUAL INNOCENCE.

Defendant, for the last twenty-one (21) years,
has been wrongly impersonated as an actual
innocent, and hereby in support thereto moves
this most honorable court to strike the motion
of the Commonwealth in opposition as untimely.

It is beyond cavil, that the court (Muse, J.)
on 12-23-2015 directed the Commonwealth to
file its opposition, if any, within (30) days. (P# 192.1).

Then on 1-07-2016, Judge Muse through a
procedural order, further enlarge time for the
Commonwealth to reply, to (60) days. (P#193).

✓-The Commonwealth's 24 MAR 2016 "postmarked" papers, falsely dated
14 MAR 2016, falls far outside the court (Rufo, J.) granted 29 FEB. 2016 time to
enlarge to reply (P#194). Therefore, the 24 MAR 2016 paper not received
by defendant until 26 MAR 2016, is time barred by "waiver," or defective
laches. SEE, ex. "A."

MOREOVER, THE RECORD (ORIGINAL) DOCKET³
 WHOLLY UNDERPINNS DEFENDANT'S CLAIM THAT
 NOTWITHSTANDING SPECIFICALLY STYLED BERRY
 DISCOURSE MOTIONS; THE COMMONWEALTH
 INTENTIONALLY SCREENED EXONERATORY MEDICAL/
 SCIENTIFIC EVIDENCE. SEE, P##13,14.

EVEN THREE MOTIONS TO COMPEL, P##34,37
 #47, DID NOT CAUSE THOSE "SCIENTIFIC PHYSICAL
 EVIDENCE (P#13), OR "SCIENTIFIC WITNESSES" (P#14),"
 EXONERATORY MATERIAL TO BE DELIVERED TO THE
 DEFENDANT. SEE, NUCKOLS V. GIBSON, 233 F.3d 1261
 (10TH CIR 2000)(FAILURE TO DISCLOSE IMPEACHMENT
 EVIDENCE THAT KEY POLICE [OCME ZANE] WITNESS, WHO
 MAY HAVE PROMPTED ILLEGAL CONFESSION BY
 COMMITTING EDWARDS³ VIOLATION, HAD FLUNKED POLYGRAPH
IN CONNECTION WITH A THEFT INVESTIGATION, HAD
P-EXB. "B"
P-EDWARDS V. ARIZ., 451 U.S. 477 (1981)

BEEN UNDER INVESTIGATION BY POLICE
 DEPARTMENT FOR SLEEPING ON THE JOB,
 AND THIS HAD MOTIVE TO EMBELLISH
 DEFENDANT'S STATEMENT AND THEREBY
 INGRATIATE HIMSELF WITH POLICE DEPT,
 AND HAD SOME INVOLVEMENT IN PROVIDING
 MONEY TO FUND A HOMICIDE); UNITED STATES
v. MUSE, 708 F.2d 513 (10TH CIR. 1983) (Prosecutor
 MUST PRODUCE BRADY MATERIAL IN PERSONNEL
 FILES OF GOVERNMENT AGENTS EVEN IF THEY
 ARE IN POSSESSION OF ANOTHER AGENCY [OCME]);
UNITED STATES v. Brooks, 966 F.2d 1500 (D.C. Cir.
 1992) (prosecutor must produce BRADY MATERIAL
 THROUGH SEARCH OF PERSONNEL RECORDS OF
 POLICE OFFICER/WITNESSES TO FULFILL BRADY
⁴
 OBLIGATION).

4- THE PROSECUTOR'S OFFICE HAS A DUTY TO ENSURE THAT ALL MATERIAL
 INFORMATION IS DISCLOSED, BRADY HOLDS THAT NON-DISCLOSURE OF
 MATERIAL EVIDENCE VIOLATES DUE PROCESS "IRRESPECTIVE OF THE GOOD
 FAITH OR BAD FAITH OF THE PROSECUTION." ACCORD, GIGLIO v. U.S.,
 405 U.S. 150, 153 (1972). IN 2005, BRADY EXCULPATORY MEDICAL
 EVIDENCE SUPPRESSED, DESPITE SPECIFIC BRADY DISCOVERY MOTIONS
 BY DEFENDANT WAS "NEVER DISCLOSED," AND RESULTED IN (5) EXPERT
 ACADEMIC/BOARD CERTIFIED FORENSIC PATHOLOGIST FINDING A 'NATURAL
 FATAL CARDIAC ARRHYTHMIA' AS TRUE CAUSE OF ELIZABETH SNELL'S DEATH.
 SEE, EX.B. C-6.

&

Defendant Denied suppressed Brady material in his 1995 trial; moved in 2005, for written discovery of all autopsy materials in the custody of the Office of the Chief Medical Examiner (OCME).⁵

ON Dec. 16, 2005 Superior Court Justice Richard Cannon GRANTED defendant's written discovery, and ordered that the OCME open all its files to the defendant's inspection. However, Judge Cannon's order to the OCME, which should have given defendant the 1995 Brady requested scientific witnesses, e.g. Muse, Beatts, Gibson, Supera, was not complied with.

DURING 2006, DEFENDANT'S THEN COUNSEL IRVING MARMER ENGAGED CHIEF OF PATHOLOGY, DR. ED FRIEDLAUDE. SEE, EX.3.C-2,3.

EX.C

ON MARCH 26, 2012, DR. FRIEDLAUER
By AFFIDAVIT, Concluded His Expert Pathology,
AND STATED: "... My REVIEW OF THE GLASS SLIDES
AT ONCE REVEALED THAT THE TISSUES CAME FROM
MORE THAN ONE PERSON. THE SECTIONS OF LIVER
WERE OBVIOUSLY FROM TWO DIFFERENT PEOPLE, AND
ONE OF THE SECTIONS OF HEART, UNQUESTIONABLY,
CAME FROM A BABY." Id. at 973.

IN FACT, DR. FRIEDLAUER WAS SO SURPRISED
BY THE MULTIPLE DIFFERENT PEOPLE ANATOMICALS, ESPECIALLY,
THE BABY HEART/LIVER; IN SO MUCH AS, OCME ZANE TESTIFIED
THAT ELIZABETH SWAL WAS 'A HEALTHY 52 YR OLD,' THAT
A TRIP TO THE BARBOSA OCME WAS ARRANGED FOR
MICROSCOPIC EXAMINATION OF THOSE "ORIGINAL"
TISSUE SLIDES/PARAFFIN BLOCKS IN THE OCME'S
CUSTODY SINCE 1995.

WHEREUPON MICROSCOPIC EXAMINATION
USING OCME EQUIPMENT, DR. FRIEDLAUER CONFIRMED
HIS PRELIMINARY MULTIPLE DIFFERENT PEOPLE PRESENCE
FINDINGS, ON THE ORIGINAL ANATOMICAL MATTERS.

THE COMMONWEALTH CONCEDES THAT THEY
LACK STANDING TO OPPOSE, IN THAT, PURSUANT TO
C. 278A, et seqq. TO DATE, JUDGE MUIR ASSIGNED
TO THE INSTANT MATTER BY REGIONAL
ADMINISTRATIVE JUSTICE GENE NICKELSON (1/5/12, P#161),
HAS MADE NO PRELIMINARY FINDING ON THE:
(a) AFFIDAVIT OF DR. ED FRIEDLANDER; (b) ANALYSIS OF
DR. THOMAS YOUNG; (c) REPORT OF OEME FORMER
CHIEF OF STAFF DR. SHANON KESSLER; (d) AFFIDAVIT
OF FORMER OEME PATHOLOGIST DR. GERALD FEIGIN, OR
(e) FORMER NEW YORK CITY MEDICAL EXAMINER DR.
MICHAEL BADEN.

Moreover, C. 278A, ss 3(b)(1)(2)(3)(4)(5), IS
CLEARLY MET BY THE DEFENDANT, WHEREAS, THE
FOLLOWING CRITERIA DEMONSTRATES SUCH:

(b)- THE MOTION SHALL INCLUDE... AFFIDAVITS FILED IN
SUPPORT (FRIEDLANDER, FEIGIN, BADEN)... SIGNED
BY A PERSON WITH PERSONAL KNOWLEDGE...

~~f~~- SEE, EXHS C2, C3, D, E, F, G.

(b)(1)- NAME AND DESCRIPTION OF THE REQUESTED
 [DNA] FORENSIC OR SCIENTIFIC ANALYSIS;

(2)- INFORMATION DEMONSTRATING THAT THE
 REQUESTED ANALYSIS IS ADMISSIBLE AS EVIDENCE

[ALL FIVE EXPERT ACADEMIC/BORD CERTIFIED FORENSIC
 PATHOLOGISTS MICROSCOPICALLY EXAMINED ANATOMICAL;
 BORN SUPPLIED AND IN THE OCME'S CUSTODY SINCE
 1995] [ARISING DIRECTLY OUT OF THE OCME ZANE
 AUTOPSY OF ELIZABETH SNELL] ;

(3)- DESCRIPTION OF EVIDENCE/BIOLOGICAL MATERIAL

[Tissue slides/paraffin blocks IN THE OCME CUSTODY
 SINCE 1995] THAT THE MOVING PARTY SEEKS TO HAVE
 ANALYZED OR TESTED, INCLUDING ITS LOCATION [OCME]
 AND CHAIN OF CUSTODY [OCME SINCE 1995] (IF KNOWN);

(4)- INFORMATION DEMONSTRATING THAT THE ANALYSIS

[UNASSAILABLE EVIDENCE OF BABY HEART/LIVER - ANALYZED
 /INACIDIFIED LIVER] HAS THE POTENTIAL TO RESULT
 IN EVIDENCE THAT IS [BRADY SUPPRESSED EXC/PATRICK
 1995 MEDICAL] MATERIAL ;

(5)- INFORMATION DEMONSTRATING THAT THE EVIDENCE OR BIOLOGICAL MATERIAL HAS NOT BEEN SUBJECTED TO THE REQUESTED ANALYSIS BECAUSE:

- (i) DUE TO PROSECUTOR/OCME'S INTENTIONAL SUPPRESSION OF BRADY EXCULPATORY MEDICAL/SCIENTIFIC PHYSICAL/WITNESSES (P#S 13, 14), DEFENDANT WAS BARRED SCIENTIFIC ANALYSIS OF THE 1995 THIN UNKNOWN; 2006 "NEWLY DISCOVERED" BABY HEART/LIVER; AUTOLYZED-NO ANALYZED LIVERS;
- (ii) HAD THE COMMONWEALTH NOT INTENTIONALLY SELECTED THAT SPECIFICALLY SOUGHT BRADY SCIENTIFIC PHYSICAL EVIDENCE (P#S 13), THE DEFENSE WOULD HAVE UTILIZED THE BABY HEART/LIVER, AUTOLYZED-NO AUTOLYZED LIVER TO IMPROVE OCME ZANE'S "DIAGNOSIS OF EXCLUSION" "ASPHYXIA DUE TO SMOTHERING" FAIRLY FLAWED FINDING, WHICH IN FACT, CONSISTENT WITH THAT MEDICAL EVIDENCE, CAUSE OF ELIZABETH SWELL'S DEATH WAS 'A NATURAL FATAL CARDIAC ARRHYTHMIA';
- (iii) NEITHER THE DEFENDANT, OR HIS TRIAL COUNSEL IN 1995 WERE AWARE, PARTICULARLY DUE TO THE PROSECUTOR'S INTENTIONAL SELECTION OF THAT SPECIFICALLY REQUESTED BRADY MEDICAL EVIDENCE/WITNESSES, COULD NOT FORSEE THE EXISTANCE, WHETHER AS, DIRECT RELIANCE OF TRUTHFULNESS WAS PLACED ON MICHAEL O'KEEFE'S BRADY DISCLOSURE OBLIGATIONS.

INDED, FOR EXPRESS PURPOSES OF C. 278A, §§ 2-12, THE DEFENDANT'S FIRST KNOWLEDGE OF THE MULTIPLE DIFFERENT PEOPLES ANATOMICAL MATERIALS WAS NOT "NEWLY DISCOVERED" UNTIL AFTER THE GRANTING BY JUDGE (COWAN) OF HIS WRITTEN DISCOVERY OF ALL AUTOPSY MATERIALS

IN THE CUSTODY OF THE OCME UNDER THEIR
CONTINUED RELIANCE OF ZANE'S FATALE FLAWED
AUTOPSY, FROM 1995.

PRIMA FACIE PROOF RELIES EXCLUSIVELY ON
BY THE DEFENDANT, RESTS ON AFFIDAVITS, ANALYSIS
AND REPORTS OF FIVE PATHOLOGY EXPERTS, EACH
HAVING MICROSCOPICALLY REVIEWED "RE-CUTS"
SUPPLIED FROM PARAFFIN BLOCKS IN THE CUSTODY OF
THE OCME SINCE 1995.

IN SUM, DESPITE THE COMMONWEALTH'S LATE,
FRAUD ON THE COURT, BY THE UNTIMELY FRICTIONAL
G.L.c. 231, 6F DILIGENTLY REPRESENTATION, THAT
BLATANTLY DISABUSE THIS COURT'S INHERIT POWERS,
ESPECIALLY IN SO FAR AS, THE DEFENDANT EXCEEDS THE
EXPECTATIONS/ REQUIREMENTS OF c. 278A, ss 3 & seqq;
THIS COURT MUST STRIKE BOTH THIS DILIGENTLY
FALSE OPPOSITION, AS WELL AS, THAT COMMONWEALTH
OPPOSITION OF 3 MAR 2016, NOT RELEASER BY THE
DEFENDANT UNTIL 19 MAR 2016.

ON MARCH 19, 2016, DEFENDANT COMMUNICATED WITH THE COURT BY LETTER,
COMPLAINING AGAIN THAT ADA SWEENEY, DESPITE (2) EXCUSE MORE OF TIMES
(#193, 194) FAILED TO OPOSE IN A TIMELY MANNER (#194) ENLARGEMENT
UP TO AND ON 29 FEB 2016, AS ORDERED (#193) BY JUDGE MUISE. HOWEVER,
PAST THAT REQUESTED 29 FEB 2016, ENLARGEMENT, THE COMMONWEALTH BY
FRAUD, MISREPRESENTATION, DECEIT, AND DISHONESTY, FILED OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL IT ON 14 MARCH 2016, YET AS EVIDENCED BY THE
POSTMARK, DID NOT NOTICE DEFENDANT UNTIL 26 MAR 2016, NEARLY (2) WEEKS
LATER, FOR SUCH FRAUD, THE COURT MUST STRIKE BOTH COMMONWEALTH
OPPOSITION AS UNTIMELY, AND AS SUCH, "WAIVED." SEE EXB. "I."

Conclusion

WHEREFORE, DEFENDANT AT BAR HAS NO ADEQUATE
REASON AT LAW, THIS MOST HONORABLE COURT MUST
GRANT THE FOLLOWING RELIEF:

A - STRIKE AS UNTIMELY COMMONWEALTH'S opposition
OF ALLEGEDLY 3 MAR 2016, AS PAST THE (30) DAY EXTENSION
PERMITTED BY JUDGE RUFO;

B - STRIKE AS SEVERELY UNTIMELY COMMONWEALTH'S
OPPOSITION ALLEGEDLY OF 14 MAR 2016, NOT RECEIVED BY THE
DEFENDANT UNTIL 26 MAR 2016;

C - GRANT DEFENDANT DNA TESTING ON THE (18) THREE
SLIDES / PARAFFIN BLOCKS IN THE CUSTODY OF THE OCME SINCE
1995;

D - GRANT DNA TESTING OF THE PILLOW, BEDDING, AND
CLOTHING OF ELIZABETH SWELL, PARTICULAR, OR DIRECTLY
ADJACENT TO EACH OF THOSE (17) CUTS, SCRATCHES OR LACERATIONS,
TO SPECIFICALLY DETERMINE IF, IN FACT, ANY WERE PRESENT AT
TIME OF DEATH;

&

E- GRANT STAND BY COUNSEL TO DEPOSE EXPERT METEOROLOGIST ROBERT E. LAUTZENHEISER, WHILE "NOTLY DISCLOSED" EVIDENCE UNASSAILABLY SHOWS THAT A "NOEL ERASER" WAS ENVELOPING THE ENTIRE CAPE & ISLANDS ON MARCH 17, 1995 AT 0630 A.M.;

F- GRANT THE TESTING OF THE PRIMATINE MINT / Brooks Braxodilator FOUND AT THE SCENE, AND IN THE STATE'S CUSTODY SINCE 1995;

G- GRANT ANY OTHER LAWFUL REMEDIES TO ENSURE JUSTICE IS DONE.

SIGNED, THIS 26TH DAY OF MARCH 2016 UNDER
PAIN AND PENALTIES OF PERJURY.

RESPECTFULLY SUBMITTED,
BY, THE DEFENDANT,

EMERY G. SWELL JR., ^{PER}
965 ELM ST.
CONCORD, MA. 01742-2119

Proof of Service

I, CERTIFY THAT ON THE 23RD OF MARCH 2016, A TRUE COPY OF THE ATTACHED WAS SERVED ON ELIZABETH SWELL, BX 455, BOSTON, MA. 02630 IN ACCORD W/103CM2 481.10 (2d/PAGE).